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Supreme Court, U.S.
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No. 93-898

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ALLEN H. GROSNICK,

Petitioner,

-against-

PETER J. EMBRIANO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the First Circuit properly held that the United States District Court for the District of Massachusetts committed an abuse of discretion in finding that Respondent did not establish good cause for failing to serve Petitioner within 120 days as required by Rule 4(j) of the Federal Rules of Civil Procedure.

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STATEMENT OF THE CASE

Following the procedural history described by the Petitioner (Petition at 5-8), the court of appeals held that, on the facts of this particular case, Respondent had demonstrated good cause for failing to serve Petitioner with a summons and the complaint within the 120 day period required by Rule 4(j) and that the decision of the district court to the contrary was an abuse of discretion. The factors which led to the court's conclusion that good cause had been demonstrated in this case were:

(1) Respondent did not purposely delay personal service but completed all steps within his power necessary to effectuate such service;

(2) the blame for the error in service rested with the deputy sheriff;

(3) Respondent reasonably believed that

he had personally served Petitioner because of the representations in the deputy sheriff's sworn return of service;

(4) Petitioner failed to notify Respondent of the specific nature of the defect until more than 120 days had passed;

(5) Respondent reasonably abstained from investigating the affirmative defense of insufficient service because of the general nature in which it was pleaded and the deputy sheriff's sworn return;

(6) the defective service did not prejudice Petitioner as he had actual notice of the lawsuit; and

(7) dismissal would prejudice Respondent because the statute of limitations had already run on some of his claims.

REASONS TO DENY CERTIORARI

The opinion rendered by the court of appeals is not in conflict with the

decisions of other courts of appeals on the same matter; does not represent a departure from the accepted and usual course of judicial proceedings; and does not otherwise require the supervision of this Court.

The court reviewed the particular facts of this case and concluded that the district court had abused its discretion by dismissing the complaint and that the circumstances warranted a finding of good cause for failure to make timely service of process. Despite Petitioner's contrary assertions, the court did not eliminate the defense of insufficient service of process nor did it negate or substantially change the Federal Rules of Civil Procedure in making its determination. Therefore, the petition for a writ of certiorari should be denied.

ARGUMENT

I. CONSIDERATIONS INFLUENCING A DECISION TO GRANT OR DENY A PETITION FOR A WRIT OF CERTIORARI.

Rule 10.1 of the Rules of the Supreme Court of the United States makes clear that "[a] petition for a writ of certiorari will be granted only when there are special and important reasons therefor." That Rule states, inter alia, that the following, though not a controlling or complete measure of the Court's discretion, are indicative of the character of reasons that will be considered:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter ... or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

As discussed below, the decision of the

First Circuit is not in conflict with the decisions of other courts of appeals on the same matter; does not represent a departure from the accepted and usual course of judicial proceedings; and does not otherwise require the supervision of this Court. Therefore, the petition for a writ of certiorari should be denied.

II. THE COURT OF APPEALS DID NOT ELIMINATE THE DEFENSE OF IMPROPER SERVICE OF PROCESS.

The Petitioner proffers two arguments as to why the petition for a writ of certiorari should be granted. First, Petitioner contends that the court of appeals effectively eliminated the affirmative defense of improper service of process by finding "that respondent reasonably believed petitioner had been properly served based upon the (perjured) statements of the deputy sheriff and the

lack of specificity in such defense regarding the nature of the defective service." (Petition at 10-11). As discussed below, the opinion of the court of appeals in no way eliminated the defense of improper service.

The issue before the First Circuit was: whether the district court abused its discretion by finding that Respondent did not establish good cause for failing to serve Petitioner within 120 days as required by Fed. R. Civ. P. 4(j). (Petition at A6). The court reviewed the particular facts of this case and concluded that the Respondent had shown good cause for the delayed service of process and the district court's failure to so find was an abuse of discretion. (Petition at A8). One factor considered by the court was whether Respondent acted reasonably in failing to further investigate the affirmative defense

of improper service. (Petition at A7). The court concluded that "[g]iven the general nature of [Petitioner's] asserted defense and the deputy sheriff's assurance in the return of service that he had personally served [Petitioner], [Respondent] reasonably abstained from further investigation."[1] (Petition at A7).

The court of appeals did not "conclude[] that an affirmative defense of improper service may be completely disregarded by a plaintiff" as Petitioner contends.

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[1] This conclusion is consistent with decisions by this Court which state that it will not be presumed that the sheriff who served process did something different when the proof of service indicates that process was served on a particular person. Settlemier v. Sullivan, 97 U.S. 444, 449 (1878); Galpin v. Page, 85 U.S. 350, 366-67 (1873). "The rule is settled that the officer's return upon the summons imports verity which can be overcome only by strong and convincing evidence." Hicklin v. Edwards, 226 F.2d 410, 414 (8th Cir. 1955).

(Petition at 11). The court merely noted that the lack of specificity with which the defense of improper service was pleaded was a factor to consider in determining whether or not Respondent acted reasonably in relying on the deputy sheriff's return and failing to further investigate the defense. (Petition at A6-A8).

In fact, as Petitioner points out, the court stated in no uncertain terms that "there is no requirement that a defendant specify the source of the defect in service" and "that under certain circumstances the assertion in an answer of insufficient service will provide notice that would induce a reasonable plaintiff to investigate the possibility of a deficiency." (Petition at A9). This is in accord with the decisions of other circuits cited by the Petitioner. See McGregor v. United States, 933 F.2d 156, 158-160 (2d

Cir. 1991); Schnabel v. Wells, 922 F.2d 726, 728-29 (11th Cir. 1991); McDonald v. United States, 898 F.2d 466 (5th Cir. 1990).[2]

The Petitioner further contends that "once an affirmative defense of improper service is interposed, a plaintiff must investigate the alleged defect in order to satisfy the 'good cause' requirement of Rule 4(j)." (Petition at 12-13) (emphasis added). However, none of the cases cited by Petitioner so holds. Instead, the several courts took the same approach taken by the court of appeals in the present case; they considered the failure of the

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[2] Petitioner also cites Way v. Mueller Brass Co., 840 F.2d 303 (5th Cir. 1988) as support for his argument that "a party is deemed to be on notice of a defect in service based upon a generally stated affirmative defense of improper service." (Petition at 11-12). The defense of improper service in Way, however, was "expressly asserted and explained", not generally stated. Id. at 306.

plaintiff to investigate the defense one factor to be weighed in determining whether the plaintiff has established good cause for the insufficient service. McGregor v. United States, 933 F.2d 156, 158-160 (2d Cir. 1991); Schnabel v. Wells, 922 F.2d 726, 728-29 (11th Cir. 1991); McDonald v. United States, 898 F.2d 466 (5th Cir. 1990); Way v. Mueller Brass Co., 840 F.2d 303 (5th Cir. 1988); Wei v. State of Hawaii, 763 F.2d 370 (9th Cir. 1985). None of these cases holds, or even implies, that a court is barred from finding that a plaintiff has demonstrated 'good cause' pursuant to Rule 4(j) if the plaintiff failed to investigate a general assertion of insufficient service.

Petitioner goes on to argue that "mere reliance on the statement of a process server, without investigating the basis for an affirmative defense contesting the

propriety of service, does not constitute 'good cause' under Rule 4(j)." (Petition at 13). None of the three cases cited by Petitioner supports this statement.

One of the cases cited, Reynolds v. United States, 782 F.2d 837 (9th Cir. 1986), offers no support whatsoever for Petitioner's statement because there was no reliance by the plaintiff on the statement of a process server regarding the fact of service. Id. at 838.

In each of the other two cases cited, the plaintiff relied on the representations of a special process server that service had been or was going to be timely completed. Lovelace v. Acme Markets, Inc., 820 F.2d 81, 83 (3d Cir. 1987), cert. denied, 484 U.S. 965 (1987) (plaintiff received a bill, i.e. an invoice, representing that process had been served); Braxton v. United States, 817 F.2d 238, 239

(3d Cir. 1987) (process server assured plaintiff's counsel that service would be completed timely). In neither case did the plaintiff receive a sworn return of service. Lovelace at 83 (plaintiff's counsel requested, but never received, proof of service from the special process server); Braxton at 239. The distinction between these cases and the case at bar is obvious. The plaintiffs in Lovelace and Braxton, unlike Respondent, did not possess a return of service signed by a deputy sheriff under penalty of perjury representing that service had been made.[3]

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[3] Lovelace and Braxton further fail to support Petitioner's statement because in neither case was there an affirmative defense to investigate. In each case, the defense of improper service was not raised by the defendant until after the defect in service had been brought to plaintiff's attention by a court clerk and corrected by the plaintiff. Lovelace at 83; Braxton at 239-40.

As the above discussion demonstrates, Petitioner's first argument does not expose any conflict between the First Circuit's opinion and the decisions of other courts of appeal on the same matter. Moreover, the opinion does not represent a departure from the accepted and usual course of judicial proceedings. The court of appeals merely reviewed the particular facts of this case and concluded that the totality of the circumstances mandated a finding of good cause. The holding of the court does not allow a plaintiff to disregard an affirmative defense of improper service, does not require a defendant to specifically set forth the nature of the defect in the defense and certainly does not eliminate the affirmative defense of improper service. Therefore, Petitioner's first argument provides no reason for granting the petition for a writ of

certiorari.

III. THE COURT OF APPEALS DID NOT HOLD THAT GOOD CAUSE PURSUANT TO RULE 4(J) REQUIRES PREJUDICE TO A DEFENDANT, THE ABSENCE OF PREJUDICE TO A PLAINTIFF AND THAT A MOTION UNDER RULE 4(J) BE MADE WITHIN 120 DAYS.

Petitioner's second argument as to why the petition for a writ of certiorari should be granted is that the court of appeals improperly held that, "before a plaintiff can be found to have failed to demonstrate 'good cause' under Rule 4(j), a defendant must be prejudiced from the improper service, a plaintiff must not be prejudiced and a motion pursuant to the Rule must be made before the 120-day period in the Rule has expired." (Petition at 15-16). This simply was not the holding of the court and does not supply a reason for granting the petition.

The court of appeals did not hold that

any particular factors must be present in order to allow a finding of good cause under Rule 4(j). In making a good cause determination a court must review the circumstances of the particular case and make a determination based on all relevant factors. Since every case involves different factors, there is no set criteria to enable a court to make a finding of good cause.

In the case at bar, a variety of factors contributed to the court's finding that Respondent had shown good cause for failing to timely serve Petitioner and was, therefore, entitled to relief. These factors included the following: 1) Respondent did not purposely delay service but instead completed all steps within his power to effectuate service; 2) the deputy sheriff was responsible for the failure to complete service; 3) the deputy sheriff's

sworn return of service led Respondent to reasonably believe that service had been completed; 4) Petitioner waited more than 120 days before notifying Respondent of the specific nature of the defect; 5) due to the general nature of the defense and the sworn return of service Respondent's failure to investigate was reasonable; 6) there was no prejudice to the Petitioner; and 7) dismissal would prejudice Respondent. (Petition at A6-A8). The court of appeals concluded that "given all of the above factors . . . [Respondent] showed good cause for the delayed personal service" and held that the district court had abused its discretion in failing to so find. However, the court did not hold that all, or any, of these factors must be present in order to establish good cause.

Petitioner correctly states that "Rule 4(j) . . . does not require that a

defendant be prejudiced before a plaintiff can be found to have failed to demonstrate 'good cause'." (Petition at 16) (emphasis added). "This does not mean, however, that lack of prejudice has no part in the 'good cause' determination under Rule 4(j)." Floyd v. U.S., 900 F.2d 1045, 1049 (7th Cir. 1990). "[T]he absence of prejudice to the defendant is a factor that ought to be considered in assessing whether the explanation offered [for the insufficient service] justifies relief." Id.

The court of appeals did not hold that a defendant must be prejudiced in order to defeat a plaintiff's assertion of good cause. The court merely considered the lack of prejudice to Petitioner one of several factors to be taken into account in determining whether good cause should be found in this case.

Petitioner further contends that

"prejudice to a plaintiff from the dismissal of an action because of the expiration of a statute of limitations is not a valid consideration in determining good cause under Rule 4(j)." (Petition at 16-17). However, the cases cited by the Petitioner do not support this statement. These cases stand for the proposition that the running of the statute of limitations does not, by itself, prevent the operation of Rule 4(j). See Geiger v. Allen, 850 F.2d 330, 334 (7th Cir. 1988) ("the fact that [plaintiff] is now effectively precluded from bringing suit . . . does not prevent the operation of Rule 4(j)"); Accord Lovelace v. Acme Markets, Inc., 820 F.2d 81, 85 (3d Cir. 1987), cert. denied 484 U.S. 965 (1987); Wei v. State of Hawaii, 763 F.2d 370, 372 (9th Cir. 1985); Winters v. Teledyne Movible Offshore, Inc., 776 F.2d 1304, 1307 (5th Cir. 1985);

Norlock v. City of Garland, 768 F.2d 654, 658 (5th Cir. 1985); Green v. Humphrey Elevator and Truck Co., 816 F.2d 877 (3d Cir. 1987). Petitioner cites no case which holds that prejudice to the plaintiff can not be considered as a factor in making a good cause determination.

Finally, the court of appeals did not hold, as Petitioner contends, that a motion pursuant to Rule 4(j) must be made before the 120-day period in the Rule has expired. (Petition at 17-18). The court merely noted that the fact that Petitioner waited more than 120 days to notify Respondent of the specific nature of the defect in service was another factor to be viewed in making the good cause determination. (Petition at A7-A8).

The court of appeals held that the Respondent in this case showed "good cause" for failing to serve Petitioner within 120

days and that the district court abused its discretion in failing to so find. In arguing that certiorari be granted because the Court has "effectively amended" Rule 4(j) by holding that "good cause" requires prejudice to a defendant, the absence of prejudice to a plaintiff and that a motion under Rule 4(j) be made within 120 days the Petitioner attempts to expand and distort the holding of the court.

Petitioner's second argument does not even assert a conflict with the decisions of other courts of appeal; indeed, none exists. Furthermore, the holding of the court does not represent a departure from the accepted course of judicial proceedings. Petitioner's second argument, therefore, supplies no reason for granting the petition for a writ of certiorari.

CONCLUSION

For all of the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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